SUPREME COURT OF THE UNITED STATES

.....Term, 1942.

No.....

BLANCHE W. BARCO, as Executrix of the Estate of SAMUEL J. BARCO, Deceased; WALTER L. HARRIS, as Trustee of said Estate; BETTY BARCO and JACK BARCO, a Minor, by BLANCHE W. BARCO, His Mother and Next Friend,

Petitioners and
Appellants below,

vs.

THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation,

Respondent and
Appellee below.

Brief in Support of Petition for Writ of Certiorari.

I.
Opinion of Court Below.

The opinion in the Circuit Court of Appeals for the Fifth Circuit (T. .....) is reported in 126 F. (2d) 56.

II.
Jurisdiction

1. The date of the decree to be reviewed is February 26, 1942. A petition for rehearing was denied on March 23, 1942.

2. The statutory provision which is believed to sustain the jurisdiction of this court is its Rule 38, Section 2.

3. The facts which show that the nature of this case and of the rulings below are such as to bring the case within the jurisdictional provision relied on are:

(a) That the decision of the Circuit Court of Appeals for the Eighth Circuit in the Marshall case, supra, excusing the insured's failure to furnish proof of his disability, even though the terms of the policy, if followed literally, would have required such proof, was ignored by the Circuit Court of Appeals for the Fifth Circuit in this case, though submitted by us as controlling because the language of the Barco policy is no more mandatory for the furnishing of such proof than is the language of the Marshall policy.

(b) That the dicision of the Circuit Court of Appeals for the Fifth Circuit in this case, while it concedes that the three Florida cases cited by it are controlling and waive the furnishing of proof of disability if such furn-

ishing is impossible or unreasonable, the court erred in not making proper application of those decisions to the undisputed facts in this case.

4. The cases believed to sustain said jurisdiction are as follows:

Minnesota Mutual Life Ins. Co. v. Marshall, 29 F. (2d) 977;

Bergholm v. Peoria Life Ins. Co., 284 U.S. 489;

Franklin Life Ins. Co. v. Tharpe, 178 So. 300, 130 Fla. 546 (Jan. 7, 1938);

Hallowes v. N. Y. Life Ins. Co., 184 So. 7, 133 Fla. 872 (July 14, 1938);

Reliance Life Ins. Co. v. Lynch, 197 So. 723, 144 Fla. 50 (May 28, 1940).

III.
Statement of the Case.

This has already been stated in the preceding petition's Summary Statement of the Matter Involved, which is hereby adopted and made a part of this brief.

IV.
Specification of Errors.

(A) The Circuit Court of Appeals for the Fifth Circuit erred in failing to interpret the Barco policy as the

policy in the Marshall case, supra, was interpreted by the Circuit Court of Appeals for the Eighth Circuit, and by this court approved in the Bergholm case, supra.

(B) The Circuit Court of Appeals for the Fifth Circuit erred in holding that the Florida law would not reinstate the Barco policy, although that law held that furnishing notice of disability would be waived if existing circumstances made its furnishing unreasonable; the court's opinion being that Mr. Barco's religious belief that his disability was not total and permanent did not make it unreasonable for him to furnish notice of it.

V.
Argument.

Point A.

The error specified in IV(A) supra:

In support of our view that the decision of the Circuit Court of Appeals for the Fifth Circuit in this case is at variance with the decision of the Circuit Court of Appeals for the Eighth Circuit in the Marshall case, supra, and with the decision of this court in the Bergholm case, supra:

The Marshall policy provides:

"If the insured shall become totally and permanently disabled as hereinafter provided and shall

> furnish satisfactory proof thereof the company will waive the payment of premiums thereafter becoming due * * *."

The Circuit Court of Appeals for the Eighth Circuit, construing this language, held that the existence of the disability **before the premium became in arrears** was enough to create the waiver of the furnishing of proof of it; and this court in the Bergholm case held:

> "We do not need to controvert this construction of the words quoted, or question the soundness of the view of the court that the existence of the disability before the premium became in arrears, standing alone, was enough to create the waiver. In that view, the obligation to furnish proof was no part of the condition precedent to the waiver; but such proof might be furnished within a reasonable time thereafter."

That Barco offered such proof in a reasonable time—upon giving up his law office in July 1939—is not denied, and the language in the Barco policy is similar to that in the Marshall policy quoted above, reading:

> "Disability Benefits shall become effective as of the date of commencement of total and permanent disability of the insured, as herein defined, if due proof of such disability is received by the Company at its Home Office within six months from said date of commencement * * *."

This language in the Barco policy is no more specific that proof must be furnished as a condition precedent than is the language above quoted from the Marshall policy, and since in the Marshall case only one year's premium had been paid, whereas in the Barco case thirteen years' had been, it is more equitable that the relief sought in the Barco case be granted.

In the **Florida Tharpe** case, supra, which approves the Marshall case, the language of the policy requiring proof of disability was more mandatory than that in either the Marshall or the Barco policy, it being:

> "If the insured after the issuance of the policy shall become totally and permanently disabled by bodily injury or disease * * * and shall furnish proof satisfactory to the Company of such disability, the Company agrees to waive further payment of premiums under said policy, such agreement to become operative only after endorsement of the same has been made on said policy by the Company."

The provisions in the Bergholm policy are, of course, much more mandatory than those in the Marshall, Tharpe and Barco policies.

To quote the last sentence of the Circuit Court of Appeals' decision in the Barco case:

> "His religion did not interfere with his duty to give notice of his disability to the insurer, which

was a condition precedent to the recovery of disability benefits."

This statement that Barco's giving of notice was a condition precedent is a definite repudiation of the Marshall case.

We submit, therefore, that a writ of certiorari should be issued by reason of the Fifth Circuit Court of Appeals' failure to follow the Marshall case.

Point B.

The error specified in IV(B) supra:

In support of our contention that the decision of th Circuit Court of Appeals for the Fifth Circuit is at vari ance with Florida law, as shown by the Tharpe, Hallowe and Lynch cases, supra, holding that if the furnishin of proof of disability is unreasonable it will be excuse how can it be held that it would not have been "unreaso able" for Mr. Barco to have furnished in July 1938 proo of his total and permanent disability as of April 25, 193 when his conscientious belief then was that such tot and permanent disability did not exist? That belief w established by his Christian Science practitioner as h testimony shows (T. 82)—a disease of cancer of the thro (as diagnosed by a medical doctor) having been by h healed in 1937, and though she continued to treat hi until July 1939, it was not known that his then existi disease was tuberculosis until several months after t

surrender of his policy. He continued to go to his law office for a year after July, 1938, and the Circuit Court of Appeals in its opinion held that this fact showed it was not "impossible" for Barco to furnish proof of his disability. We concede that statement to be correct, for we are not relying on the view that it was "impossible" for Mr. Barco to furnish notice of his disability. That it was "unreasonable" is our view, and we quote from the language of the **Florida Lynch** case, the last decided of the three Florida cases, supra:

> "It seems to be settled law in Florida that a default in serving notice of proof of loss as required by a policy may be excused where the circumstances are such as to render strict compliance with the requirements impossible or **unreasonable.** * * *" (Emphasis ours)

The Florida Supreme Court then held that the Lynch case was ruled by the Tharpe and Hallowes cases, supra.

While the Circuit Court of Appeals for the Fifth Circuit stated this to be Florida law, it did not, in our view, make proper application of it to the facts in the Barco case. To consider these facts in comparison with those in the three Florida cases, supra: (1) In Tharpe's case he was treated for tuberculosis in hospitals for two years prior to his death and did no work; (2) in Hallowes' case his total and permanent disability began four and a half months prior to his death, and he made two trips to Philadelphia for medical treatment, abandoning his

law practice, and (3) in Lynch's case he had six months of total and permanent disability prior to his death but was in a hospital for half the time. There is no evidence in either of these three cases showing any lack of knowledge or belief of total and permanent disability, or showing any hope of recovery. It would not, therefore, have been as "unreasonable" for them to have furnished proof of total and permanent disability as for Mr. Barco to have done so in July 1938, when he surrendered his policy. If an insured lacks knowledge of his total and permanent disability because of his sincere belief that it does not exist, on what theory can it be held that it would not be unreasonable for him to furnish proof of such disability? How can it be held that Mr. Barco knew he had been totally and permanently disabled for three months prior to his surrender of his policy in July 1938, when the fact is that if he had so known he could have avoided paying all premiums, have received $250.00 per month beginning April 25, 1938 until his death, and the net death benefit of about $40,000 then left to his children? In lieu of all those benefits, he got, for his surrender of the policy, $1,74.

The insurer in its answer denied its knowledge of the disability and charged Mr. Barco with negligence in failing to furnish proof of it. The insurer furnished no proof of such negligence, but we must concede the existence of it if the court holds that Barco's Christian Science faith gave him no legal excuse for failing to furnish proof of his disability; but since such negligence was not culpable it will not prevent the policy's reinstatement. To quote from **Pomeroy's Equity Jurisprudence, Third Edition (Vol. 2, Sec. 856):**

> "Even a clearly established negligence may not of itself be a sufficient ground for refusing relief if it appears that the other party has not been prejudiced thereby."

Surely the insurer was not prejudiced by Mr. Barco's failure to furnish proof, and that this principle applies to equitable reinstatement of life policies see 29 Am. Jur., Sec. 311, page 285. This is cited with approval in the Illinois case of **Boyd v. Aetna Life Ins. Co.**, 35 N.E. (2d) 99, decided in July 1941, in which a policy was cancelled for $4.19 by the wife of the insured as its sole beneficiary because of her inability to pay premiums. The husband was then separated from her, and without her knowledge or that of the company was then totally and permanently disabled. Upon proof of these facts the court reinstated the policy. The facts in the Barco case are in complete accord, and that his failure to furnish proof of disability was excused by the three Florida cases, supra, is beyond question. We respectfully request, therefore, that a writ of certiorari be granted.

Point C.

Answers to statements in the opinion of the Circuit Court of Appeals for the Fifth Circuit:

(a) "It is affirmatively alleged and proved that Barco acknowledged himself to be so disabled."

The time of Barco's acknowledgment of such disability is not therein stated. If it refers to July 1939, as shown by his letter of August 2, 1939 (Supp. T. 15), it is true;

but if it refers to July 1938, when he surrendered the policy—as it likely does since elsewhere in its opinion it stated that Barco "recognized his total disability at all times after April 15, 1938"—we respectfully deny that his knowledge of such disability was either "alleged" or proved."

The Allegations:

In the original complaint it is alleged by Barco:

> "Plaintiff did not at said time" (the time of surrender) "know the cause of his disability nor that it was total and permanent within the meaning of said policy."

In the amended complaint filed by his executrix and children it is alleged:

> "Plaintiffs aver that said policy was thus cancelled by reason of a mutual mistake between decedent and defendant, due to a lack of knowledge and belief of a then existing fact, namely, that decedent was then totally and permanently disabled, and had been for more than three months, which fact, if known, would have prevented the said cancellation of said policy. * * *
>
> "That at the time of said cancellation, decedent knew he was so disabled as to be incapacitated for his work as a lawyer, but did not then know such disability was permanent and by reason of his Christian Science faith he expected to be re-

stored to good health and hence did not ask the defendant to relieve him of the obligation to pay the premium then apparently due on said policy."

It is, therefore, **not alleged**, as claimed by the Circuit Court of Appeals, that Mr. Barco "acknowledged himself to be so disabled" as of April 25, 1938.

The Proof:

No evidence whatever is cited by the court in support of the statement above quoted and none could be, for there is none. As already shown by the testimony of his Christian Science practitioner and the District Judge's Findings of Fact, hereinabove mentioned, Mr. Barco did not acknowledge himself to be so disabled until July 1939.

(b) "It is not necessary here to determine the effect of such a sincere religious conviction upon one's contractual obligations under the law of Florida."

This finding is at variance with both the Marshall and the three Florida cases, supra, for neither of those four cases compels strict compliance with "contractual obligations" if the insured, in failing to comply with a life policy's terms, has a reasonable excuse and the insurer is not injured thereby. That Barco had a reasonable excuse for his failure to furnish proof of his disability is established by his sincere religious conviction that his dsability was not total and permanent as the policy provided, and that the insurer was not injured by Barco's failure to furnish such proof is beyond question, since the insurer will not have to pay more money on the policy's

reinstatement than it would have had to pay if the policy had not been surrendered and the notice of his disability had been furnished.

(c) "His religion did not interfere with his duty to give notice of his disability to the insurer, which was a condition precedent to the recovery of disability benefits."

On what theory is that opinion? Barco's letter of August 2, 1939, to the insurer, and the testimony of his Christian Science practitioner, (T.82) show beyond doubt that his religion did so interfere. If not, what did prevent his giving such notice? The giving of it would have given him $250.00 per month with no further premium payments, and the death benefit to his children. His failure to give it gave him $1.74.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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